Supreme Court of the United States

OCTOBER TERM, 1962
No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION, *et al.*,

Petitioners,

against

CONTINENTAL AIR LINES, INC.,

Respondent.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEYS GENERAL OF THE STATES OF ALASKA, ILLINOIS, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEW JERSEY, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND WISCONSIN, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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MISCELLANEOUS

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Interest of the *Amici*

The State of New York, in 1945, established the first administrative agency in the nation seeking to eliminate and prevent discrimination in employment based on race, creed, color or national origin, with the creation of the State Commission Against Discrimination.[1] Since that date, nineteen other States have established anti-discrimination agencies, modeled largely on the New York statute.[2]

State anti-discrimination laws are born out of a conviction that practices of discrimination because of race, creed, color or national origin menace the institutions and foundation of a free democratic state and threaten the peace, order, and general welfare of the state and its inhabitants. It is not to be concluded lightly that a state lacks power

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[1] N. Y. Sess. Laws 1945, ch. 118.

[2] A list of anti-discrimination laws administered by state agencies in twenty states is set forth in the Appendix to this brief.

to enforce its standards of equality with respect to any group of employers hiring within its borders.

The jurisdiction of the state anti-discrimination agencies has been seriously challenged by the decision of the Supreme Court of Colorado in the above-captioned case, holding that the states are powerless to act with respect to racial discrimination in the hiring practices of interstate air carriers.

Continental Air Lines, Inc., the respondent in the case at bar, has its principal offices in Colorado. Colorado is the hub of its managerial activity. It is to Colorado that applicants for employment are brought for interview, and it is in Colorado that they are hired. The holding that the State of Colorado may not validly subject such hiring practices to its standards of equality of employment opportunity strikes at the heart of state police power.

This decision by the highest Court of a sister State not only casts doubt as to the jurisdiction of state anti-discrimination commissions over interstate carriers, hitherto a settled administrative construction of the state laws, but also may encourage claims of immunity by employers in other industries engaged in interstate commerce. Industry and commerce do not stop at political boundaries, and vast sectors of the economic activity within any single state jurisdiction are affected with an interstate character. A wide area of hiring practices unaffected by anti-discrimination laws could result from the doctrine espoused by the Supreme Court of Colorado. There is no evidence that such immunity was intended by Congress, nor that Congress intended thus to frustrate a state trying to promote within its borders an equality of access to jobs irrespective of race, creed, color or national origin.

In recognition of the challenge to the jurisdiction of their anti-discrimination commissions posed by the Colorado decision now on review before this Court, the States of New York, Alaska, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey,

Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, having statutes similar to the Colorado Act here in issue, jointly file this brief in support of the petitioners in accordance with Rule 42 of this Court.

Questions Presented

Does a state statute prohibiting discriminatory hiring practices within the state impose an unconstitutional burden on commerce when applied to an interstate air carrier?

Is a state precluded by federal statute or executive order from prohibiting an interstate air carrier to discriminate in hiring practices within the state?

POINT I

The application of the Colorado Anti-Discrimination Act to the hiring practices of an interstate air carrier does not unconstitutionally burden interstate commerce.

A. The Colorado Anti-Discrimination Act is a valid exercise of the state's police power. As applied here, it imposes no actual burden on interstate commerce.

It is settled doctrine that the commerce clause of the Federal Constitution does not rob states of their sovereign power to legislate for the general welfare, even though such state legislation may incidentally affect the operations of instrumentalities of interstate commerce.

"[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the states to make laws governing matters of local concern which nevertheless in some measure affect interestate commerce or even, to some extent, regulate it." *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 at 767 (1945); see also *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443-444 (1960); *Parker* v. *Brown*, 317 U. S. 341, 359-360 (1943); *California* v. *Thompson*, 313 U. S. 109, 113-114 (1941) and cases cited; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185-191 (1938) and cases cited.

The principle was stated nearly a century ago in *Sherlock* v. *Alling*, 93 U. S. 99, 103-104 (1876), as follows:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution . . . [A]nd it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

The vigor of this doctrine has been demonstrated again and again in connection with the exercise of the State's police power to regulate conditions of employment on interstate carriers. This Court has frequently sustained such regulations in precedents which have a compelling similarity to the case at bar. Thus, in *Smith* v. *Alabama*, 124 U. S. 465 (1888), a state statute requiring the licensing of locomotive engineers as a safeguard against employees of reckless or intemperate habits was affirmed as applied to the engineer of an interstate train. This Court similarly sustained state statutes defining the size of crews manning interstate trains, *Chicago R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453 (1911); *Missouri Pac. R. R.* v. *Norwood*, 283 U. S. 249 (1931), requiring eye examinations for engineers of interstate trains, *Nashville C. & St. L. Ry.* v. *Alabama*, 128 U. S. 96 (1888), prescribing regulations for the payment of wages of employees of interstate railroads, *Erie R. Co.* v. *Williams*, 233 U. S. 685 (1914), and requiring interstate trains to be equipped with cabooses for the benefit of rail-

road employees, *Terminal Railroad Ass'n.* v. *Trainmen*, 318 U. S. 1 (1943).

In each of these cases, an evil existed which the State sought to remedy by a regulatory statute which in some measure affected interstate commerce. In the *Erie* and *Terminal* cases, *supra*, the result of the statute was to increase the costs of operating an interstate carrier. The effect of the full train crew statutes was to require the carriers to hire in certain states additional employees whom they claimed they did not need. Yet, in each case, the state regulation was sustained in recognition of the local interest in protecting the welfare and safety of both employees and the general public.

The denial of equal economic opportunities and advantages to individuals because of their color is an evil which the state clearly has as much interest in abolishing as the evils sought to be remedied in the above cited cases. The validity of the state legislation against discrimination in employment based on race, creed, color or national origin is no longer subject to dispute and indeed, is not challenged in the present case. In *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945), this Court, in sustaining the application of a section of the New York Civil Rights Law prohibiting racial discrimination in union membership, rejected the contention that a state anti-discrimination law violated the Fourteenth Amendment as a "distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U. S. at page 94. As stated by Mr. Justice Frankfurter in a concurring opinion (at p. 98):

> "* * * a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt."

It should be noted that in the *Corsi* case, this Court sustained the application of a state anti-discrimination statute

to a postal mail clerks' labor organization composed solely of federal employees. This Court, in rejecting the contention that the state statute interfered with the exclusive federal control of the postal service, said as to the New York law (326 U. S. at p. 96): "It does not burden the government in its selection of its employees or in its relations with them."

A state anti-discrimination law is not a burden on the postal service, Congress' exclusive domain; and we submit that it is not a burden on interstate commerce.

By a practical test, there is no actual burden on the respondent resulting from the necessity for its compliance with the Colorado Anti-Discrimination Act.

The anti-discrimination statute, unlike the statutes involved in the aforementioned railroad cases (*Smith, Chicago, Missouri, Nashville, Erie* and *Terminal, supra*), does not even increase the operating costs of the interstate air carrier, nor in any manner impair the usefulness of the respondent's facilities for air traffic. Nor does the Colorado statute require the respondent to hire men it does not need (unlike the contentions made in the full crew cases). The employer retains the right to decide whether to hire, how many to hire, and when to hire. Colorado only requires the employer, when hiring within the state, to eliminate discrimination based on race, creed, color or national origin in its choice of applicants.

The anti-discrimination statute, unlike the statutes involved in the aforementioned railroad cases (*supra*), is not aimed only at carriers. The Colorado statute applies alike to all employers of six or more employees who conduct hiring practices within the state, Colo. Rev. Stat. Ann., §§ 80-24-2(5) (1960 Supp.); and it is not suggested nor can it be suggested that it discriminates against interstate commerce.

This Court has sustained a variety of state regulations of conditions of employment on interstate carriers, as

shown above. *A fortiori*, it is submitted that the application of a state law to eliminate discrimination in employment, which imposes no cost or other actual burden on such carrriers, should be sustained.

If the application of the Colorado statute in the instant case has any effect, it will be to *aid*, rather than to burden commerce, by facilitating the removal of arbitrary barriers preventing individuals with special skills and training from serving the instrumentalities of interstate commerce.

B. The Colorado Anti-Discrimination Act does not and cannot destroy uniformity in the regulation of interstate commerce.

The Supreme Court of Colorado based its decision that the application of the Colorado Anti-Discrimination Act was invalid upon the proposition that "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States." 368 P. 2d 970, at p. 973.

Even if the Court's proposition were valid with respect to the regulation of racial discrimination against interstate *passengers*, the subject of the cases relied on by the Court —*Hall* v. *De Cuir*, 95 U. S. 485 (1878), and *Morgan* v. *Virginia*, 328 U. S. 373 (1946)[3]—it could not govern with respect to applicants for employment, since the law of the state where an employment contract is made is honored throughout the nation. *Moore* v. *Illinois Central R. Co.*, 136 F. 2d 412 (5th Cir. 1943); *Hansen* v. *Arabian American Oil Co.*, 195 F. 2d 682 (2d Cir. 1952), cert. den. 344 U. S. 828 (1952).

Assuming *arguendo*, however, that uniformity is a constitutional test in this case, there is nevertheless no basis

[3] It may be noted that the factual burden which was present in the *Hall* and *Morgan* cases, *supra*, resulting from the existence of conflicting state laws respecting segregation of passengers on carriers, is no longer possible in view of recent decisions. *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962); *Gayle* v. *Browder*, 352 U. S. 903 (1956), *affirming* 142 F. Supp. 707 (M. D. Ala. 1956).

for holding that the application of a state anti-discrimination statute to the hiring practices of an interstate carrier within the States operates to disrupt the required uniformity in interstate commerce.

Nothing in the record of the present case suggests that the application of the Colorado law is subjecting the respondent carrier to diverse state requirements. See *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 448 (1960).

Nor could the application of the Colorado statute be invalidated under the commerce clause through mere speculation concerning the possibility of future conflicts with the laws of other jurisdictions. In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), an operator of an excursion boat, admittedly engaged in foreign commerce between Detroit and a Canadian amusement park, was convicted under a Michigan anti-discrimination law for refusing passage to a Negro. In sustaining the conviction, this Court dismissed the possibility that Canada might adopt regulations in conflict with Michigan's as "so remote that it is hardly more than conceivable" (p. 37).

But the complete answer to the Colorado Court's *ratio decidendi* is that in the instant case, the possibility of diverse state regulations affecting racial discrimination in employment is not only remote, but is constitutionally impossible. The states may validly act to *bar* racial discrimination in employment. *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945). Conflicting state legislation *requiring* discrimination in employment based on race, creed or national ancestry would clearly be proscribed by the Fourteenth Amendment. As this Court stated in *Truax* v. *Raich*, 239 U. S. 33, 41 (1915):

> "It requires no argument to show that the right to work for a living in the common occupations of the commmunity is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Cases cited] If this could be refused solely upon the ground of

> race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

See also *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948). Nor may state assistance be invoked either directly or indirectly to enforce or effectuate *private* discrimination. *Shelley* v. *Kraemer*, 334 U. S. 1 (1947); *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

In determining whether a local law had imposed an undue burden on interstate commerce, this Court recently had occasion to restate the applicable principle as follows:

> "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand." *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 448 (1960).

The Colorado statute against discrimination in employment is based on the police power and neither discriminates against interstate commerce nor operates to disrupt its required uniformity. Hence, it may constitutionally be applied to an interstate employer.

POINT II

Colorado is not precluded by federal legislation or executive order from prohibiting discrimination in employment by an interstate carrier hiring within the state.

No claim has been made, nor can be made, that the Colorado Anti-Discrimination Act conflicts with or is inconsistent with any provision of a federal law or regulation.

However, an erroneous contention has been made in behalf of respondent that the federal government has manifested an intention to preempt the area of regulation here in issue to the exclusion of the states.[4]

Before proceeding to the specific statutes and orders which are claimed to indicate the alleged intent, a brief review of the applicable principles of law would be in order.

A. The intent of the Federal Government to abridge or displace the police power of the states must be clearly shown.

The precedents in this Court establish that preemption by the Federal Government may not be inferred in areas of local concern where the state has power to regulate for the general welfare unless such an intent is clearly manifested.

This principle was applied in the one other case reviewed by this Court involving the question of federal power versus a state law against discrimination in employment. *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945). There this Court upheld the application of a section of the New York Civil Rights Law prohibiting labor organizations from denying membership to any person because of his race, color or creed as applied to an organization of postal clerks of the United States Railway Mail Service. In addition to rejecting the argument that the application of the law was an invalid interference with Congressional authority over postal matters, the Court dismissed the contention that various federal statutes regulating the terms and conditions of employment of railway mail clerks indicated an intent on the part of Congress to occupy completely the field of regulation of federal postal employees and their labor organizations.

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[4] The Supreme Court of Colorado did not reach this question, having disposed of the case on another ground. The lower court in Colorado considered the question and concluded that the respondent's position was sound (Record, pp. 257-287).

The Court concluded (p. 97):

> "Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749, and cases cited. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded."

The same principle was recently illustrated in *Huron Cement Co.* v. *Detroit*, 362 U. S. 440 (1960), where both the federal government and the City of Detroit inspected the boilers aboard vessels operating in interstate commerce —the federal government, for safety and the City, for air pollution. In the case reaching this Court, the federal inspectors had approved the boilers, while the City held them defective. This Court rejected the claim of pre-emption and sustained the application to the interstate vessel of the criminal provisions of the local smoke abatement ordinance, expressing its adherence to "the teachings of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U. S. at 446. This Court stated (p. 443):

> "In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its polic power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' *Savage*

v. *Jones*, 225 U. S. 501, 533. See also *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Maurer* v. *Hamilton*, 309 U. S. 598."

Even if the federal law does extend to regulation of the specific area which is covered by the state law and seeks to achieve an identical result, it may not be inferred that the federal government intended to make its jurisdiction exclusive unless such an intention is clearly manifested. For example, in *De Veau* v. *Braisted*, 363 U. S. 144 (1960), this Court held that § 8 of the New York Waterfront Commission Act, which disqualified certain convicted felons from holding office in any waterfront labor organization, was not preempted by the Labor-Management Reporting and Disclosure Act of 1959 although Congress in that Act had imposed a similar restriction. The Court stated (p. 156):

> "The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualifications of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies."

A test of the issues in the instant case against the foregoing principles leads to only one conclusion, as the following pages will show: that the application of the Colorado Anti-Discrimination Act to the hiring practices of interstate carriers serves only to support, rather than to conflict or interfere with, a national policy dedicated to eliminating discrimination in employment; and that there is no evidence that the federal government has intended to preempt this field of regulation, where the enormity of the problem suggests the urgent need for supplementary efforts by the states. *Cf. California* v. *Zook*, 336 U. S. 725, 737 (1949).

B. Neither the Railway Labor Act nor the Civil Aeronautics Act precludes state action with respect to discriminatory hiring practices by air carriers.

The contention that the Railway Labor Act and the Civil Aeronautics Act manifest an intent by Congress to exclude the states from applying their anti-discrimination law to interstate carriers is patently erroneous.

In enacting the Railway Labor Act,[5] certain provisions of which apply to air carriers (45 U.S.C. §§ 181-188), Congress sought "to provide a framework for peaceful settlement of labor disputes between carriers and their employees to insure to the public continuity and efficiency of interstate transportation service . . ." *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, 609 (1959). The Act contains no section treating the matter of racial discrimination. This is expressly conceded by the Colorado District Court, which sustained the respondent's argument as to preemption (Record, p. 274). The sole basis of that Court's position as to the Railway Labor Act is its erroneous conclusion that the decisions in *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952); and *Conley* v. *Gibson*, 355 U. S. 41 (1957), have interpreted the Act to prohibit racial discrimination by employers. However, these cases all dealt with discrimination by *labor unions* against employees. This Court held that the duty of the federally sanctioned bargaining representative under the Railway Labor Act includes the duty to represent all employees in the unit fairly without racial discrimination directed against fellow employees. Such decisions have no application to discriminatory hiring practices by an employer where the issue of misuse of federally conferred power is not involved. It should be further noted that the decisions dealt with the right of Negroes *after* they had been hired, and did not concern the right of the individual job *applicant* to be protected against racial discrimination.

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[5] 44 Stat. 577 (1926), as amended, 45 U. S. C. §§ 151-188 (1952).

Thus, there is no provision in the Railway Labor Act concerning racial discrimination by air carriers against job applicants; and, even if the Act could be so interpreted, the states are not precluded from regulating in the same area since there is no evidence of any federal intent to preempt the field and exclude state regulation.

The state District Court further erred in holding that the Civil Aeronautics Act preempted the field of racial discrimination in employment by interstate air carriers. The Court's conclusion resulted from a hasty reading of the word "discrimination" in §§ 402(c) and 484(b) of the Civil Aeronautics Act of 1938,[6] not supported by any judicial interpretation. Section 402(c) declares, as a policy of the act, "the promotion of adequate, economical, and efficient *service* by air carriers at reasonable charges without unjust discriminations * * *" (emphasis added). Section 484(b) provides that "no air carrier * * * shall * * * subject any particular person * * * *in air transportation* to any unjust discrimination * * *" (emphasis added). For purposes of the act, "air transportation" is defined as "carriage by aircraft of persons or property as a common carrier * * * in commerce * * *" § 401(10), (21).

The purpose of the Civil Aeronautics Act as set forth in its declaration of policy in § 402 (now 49 U.S.C. § 1302) is to regulate air transportation in such manner as most adequately and efficiently promotes foreign and domestic commerce, air safety and national defense. Clearly, the prohibitions against discriminatory conduct contained in the sections to which we have just adverted are limited to discrimination in service against passengers or property. Nowhere do these sections mention or apply to the carrier's employees, job applicants or employment practices. *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956), cited by the Colorado District Court, held that § 484(b) protected air carrier *passengers*

[6] 52 Stat. 973 as amended 49 U. S. C. §§ 401-722 (1952). This act was repealed by the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301, *et seq.*, which reenacted the 1938 act with additional provisions.

from racial discrimination, but there is nothing in the opinion which expressly or impliedly extends the section to cover discrimination by air carriers in the hiring of personnel.

A careful reading of the Civil Aeronautics Act leads to the further conclusion that Congress did not by its regulation under the Act intend to occupy the field of regulation of air carriers to the exclusion of the states. See § 676 of the Act (now found in 49 U.S.C. § 1506) entitled "Remedies Not Exclusive". As the Court commented on § 676 in the *Fitzgerald* case, *supra* (229 F. 2d at 502, n. 5):

> "The effect of 49 U.S.C.A. § 676 is to avoid the contention that the provisions of the [Civil Aeronautics] Act nullify rights under state laws."

Even if these federal statutes could be interpreted to prohibit racial discrimination in employment by air carriers, similar action by the states to achieve an identical result has not been foreclosed, since Congress has evinced no clear intention to make its regulation exclusive in this area. *Cf. De Veau* v. *Braisted*, 363 U. S. 144 (1960); *California* v. *Zook*, 336 U. S. 725 (1949), discussed *ante*, page 12.

It is, we submit, impossible to see how a state anti-discrimination law seeking to remove an arbitrary racial barrier to the hiring of applicants on the basis of skill, merit and experience can in any manner frustrate or interfere with the purposes of these federal statutes, nor is there anything in the statutes themselves nor in the judicial construction of these statutes that supports a theory of Congressional intent to preempt the field of regulation here in issue.

C. The application of the Colorado Anti-Discrimination Act is not preempted by federal executive action.

There is no basis for the Colorado District Court's finding of preemption by reason of federal executive orders requiring the insertion of non-discrimination clauses in

government contracts with private employers. Executive Orders Nos. 10479, 18 Fed. Reg. 4899 (1953), and No. 10557, 19 Fed. Reg. 5655 (1954)[7] were issued pursuant to the President's control over the operations of the executive department, not as orders regulating commerce, which would have required Congressional authorization. *United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U. S. 296 (1955). In the absence of Congressional authorization, these executive orders cannot establish any Congressional intent of pre-emption under the commerce clause.

However, even if these executive orders were accorded the status of Acts of Congress, they fail to evidence any intent to limit the operations of state anti-discrimination commissions. Indeed, to hold that preemption has occurred in the instant case would frustrate rather than assist the federal policy set forth in Executive Order No. 10479 "to promote the fullest utilization of all available manpower" and "to promote equal employment opportunity for all qualified persons."

The assistance rendered by state anti-discrimination agencies in promoting equal employment opportunity was itself acknowledged by § 7 of Executive Order No. 10479, which authorized the President's Government Contract Committee "to establish and maintain cooperative relationships with agencies of state and local governments, as well as with non-governmental bodies, to assist in achieving the purposes of this order."

POINT III

The role of the state anti-discrimination agencies is vital and necessary to combat racial discrimination in employment.

The President's Committee on Civil Rights, which, in 1947, advocated federal anti-discrimination legislation,

[7] These orders which were considered by the Colorado District Court to be applicable to this case were subsequently superseded by Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).

recognized the need for state action in this area by declaring:

> "There is much that the states and local communities can do in this field and much that they alone can do . . . The very complexity of the civil rights problem calls for much experimental, remedial action which may be better undertaken by the states than by the national government. Parallel state and local action supporting the national program is highly desirable . . . the enactment of a federal fair employment practice act will not render similar state legislation unnecessary." *To Secure These Right,* 102 (1947).

Twenty states have undertaken, in the highest traditions of state regulation for the general welfare, to eliminate practices of racial and religious discrimination in employment.[8] The problem of eliminating racial and religious discrimination from the private sector of our economy is one that eminently lends itself to state initiative. Because of our different regional traditions in intergroup relations, it is inevitable that the pace of community consensus and legal enforcement in this matter will be quicker in certain states than in others. The enduring value of the federal system is that it allows for and encourages such independent development. Appropriately, the states should not be restrained, but should be left free to hasten as best they can in their individual ways the creation of conditions of full equality for all their inhabitants irrespective of race, creed, color or national origin. Moreover, to preclude the states from eliminating the discriminatory hiring practices of any group of employers due to their involvement in interstate commerce

[8] The extent of the workload of the state anti-discrimination agencies can be seen in the example of the New York State Commission Against Discrimination—now known as the State Commission for Human Rights. In the period 1945-1961, the Commission received 7111 complaints alleging discrimination in employment. In 1961 alone, the Commission handled 1254 employment discrimination complaints, in addition to others dealing with public accommodations and housing. See 1961 SCAD Annual Report, at pages 10, 17 (mimeo., 1961).

serves only to clothe such discriminatory conduct with relative immunity from any governmental interference and to frustrate the effort by the states to meet effectively within their borders the problem of such discrimination, along with its concomitant evils. Such are the social and historical dimensions of the case at bar behind the issue of state versus federal power which is posed by the respondent.

CONCLUSION

The decision of the Court below that the application of the Colorado Anti-Discrimination Act to an interstate air carrier is unconstitutional should be reversed.

Dated: New York, N. Y., January 14, 1963.

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APPENDIX

State Laws Against Discrimination in Employment Enforced by Administrative Agencies

ALASKA	Alaska Comp. L. Ann. §§ 43-5-1 through 43-5-10 (1957 Supp.)
CALIFORNIA	Ann. Calif. Codes, Labor Code §§ 1410 through 1432 (West, 1962 Cum. Supp.)
COLORADO	Colo. Rev. Stat. Ann. §§ 80-24-1 through 80-24-8 (1960 Perm. Supp.)
CONNECTICUT	Gen. Stat. Conn., 1958, §§ 31-122 through 31-128 (1962 Rev.)
ILLINOIS	Ill. Ann. Stat. ch. 48 §§ 851 through 866 (Smith-Hurd, 1962 Cum. Supp.)
INDIANA	Ann. Ind. Stat. §§ 40-2307 through 40-2317 (Burns, 1962 Cum. Supp.)
KANSAS	Gen. Stat. Kan. §§ 44-1001 through 44-1008 (1955 Supp.), as amended by L. 1961, ch. 248
MASSACHUSETTS	Ann. L. Mass., 1957, ch. 151B §§ 1 through 10 (Michie, 1961 Cum. Supp.)
MICHIGAN	Mich. Stat. Ann. §§ 17.458(1) through 17.458(11) (1960)
MINNESOTA	Minn. Stat. Ann. §§ 363.01 through 363.13, as amended by L. 1961, ch. 428
MISSOURI	Mo. Ann. Stat. §§ 296.010 through 296.070 (Vernon, 1962 Cum. Supp.)
NEW JERSEY	N. J. Stat. Ann. §§ 18:25-1 through 18:25-28 (West, 1962 Cum. Supp.)
NEW MEXICO	N. Mex. Stat. Ann. §§ 59-4-1 through 59-4-14 (1960 Replacement)

Appendix

NEW YORK	N. Y. Executive Law §§ 290 through 301
OHIO	Ohio Rev. Code Ann. §§ 4112.01 through 4112.08 (Page, 1962 Supp.)
OREGON	Ore. Rev. Stat. §§ 659.010 through 659.115 and 659.990 (1959-60 Supp.)
PENNSYLVANIA	Pa. Stat. Ann., tit. 43 §§ 951 through 963 (Purdon, 1961 Cum. Supp.)
RHODE ISLAND	R. I. Gen. L. §§ 28-5-1 through 28-5-39 (1956)
WASHINGTON	Rev. Code Wash. §§ 49.60.010 through 49.60.320 (1962)
WISCONSIN	Wis. Stat. Ann., 1957, §§ 111.31 through 111.38 (West, 1962 Supp.)